

Library

BEFORE THE
POLLUTION CONTROL HEARINGS BOARD
STATE OF WASHINGTON

IN THE MATTER OF)
BAR U RANCH, INC.,)
)
Appellant,)
)
v.)
)
STATE OF WASHINGTON,)
DEPARTMENT OF ECOLOGY, and)
MAX HINRICHS SEEDS,)
)
Respondents.)

PCHB No. 77-63

FINAL FINDINGS OF FACT,
CONCLUSIONS OF LAW
AND ORDER

This matter, the appeal of the granting of a permit to appropriate public ground water issued by the Department of Ecology to Max Hinrichs Seeds, came before the Pollution Control Hearings Board, W. A. Gissberg, Chairman, Dave J. Mooney, and Chris Smith at a formal hearing in Spokane, Washington on July 20, 1977. David Akana presided.

Appellant was represented by its corporate secretary, Richard A. Coon; respondent Max Hinrichs Seeds was represented by Robert Hinrichs, its partner; respondent Department was represented by Robert V. Jensen, assistant attorney general.

1 Having heard the testimony and having examined the exhibits, the
2 Pollution Control Hearings Board makes these

3 FINDINGS OF FACT

4 I

5 Max Hinrichs Seeds (hereinafter "Hinrichs") is a partnership which
6 owns approximately 3,000 acres of land located about seven miles southwest
7 of Benge, Adams County, Washington. On February 14, 1976, Hinrichs made
8 application for the appropriation of 18,000 gallons per minute (GPM) and
9 8,750 acre-feet per year of ground water for the purpose of irrigating
10 2,500 acres of its land from March through November of each year. Such
11 appropriation was to be made through nine 16-inch diameter wells, each
12 being 1,200 feet deep.

13 II

14 Appellant Bar U Ranch, Inc. (hereinafter "appellant") is a family
15 corporation which owns or leases 6,667 acres of land located east of the
16 Hinrichs' property. Only 263 of these acres are irrigated. Cow Creek
17 divides appellant's property along a north-southeast line. Appellant
18 possesses water rights to the creek, or springs nearby or tributary
19 thereto, some of which date back as far as 1909, and all of which are
20 higher in priority relative to Hinrichs' permit. Although there may be
21 no water from upriver sources about two years out of every ten years,
22 appellant has met its needs from the numerous springs on its property.
23 The sole source of revenue for appellant's operation is based upon its
24 300-350 brood cows, each of which require 15-20 gallons of water each day.
25 An uninterrupted supply of water is vital to appellant's survival, and
26 for this concern, it has stated its apprehensions concerning Hinrichs'

27 FINAL FINDINGS OF FACT,
CONCLUSIONS OF LAW AND ORDER

1 application to the Department.

2 III

3 Notwithstanding appellant's protests, the Department, after making
4 two field examinations and considering other water rights, including
5 the location, amount of withdrawals, type of withdrawals, i.e., surface
6 or ground water, and if ground water, the depth, concluded that water was
7 available and may be appropriated for a beneficial use, and that such use
8 will not impair existing rights or be detrimental to the public welfare. Th
9 amount of withdrawal was limited to 6,250 acre-feet per year, and the
10 permit was subject to numerous provisions, three of which are here
11 contested.

12 IV

13 Respondent's watermasters told appellant that if the application
14 was approved it would be on the basis that (a) a test well would be
15 required; (b) casing would be required to a 600 foot depth, and (c) any
16 "effect" in the water flow of springs and wells of the surrounding
17 property would be assumed to have been caused by Hinrichs, and the wells
18 shut down. When the permit was issued by superior authority within the
19 Department of Ecology, appellant noted that no test well was required,
20 that casing was required to a 500 foot depth as a minimum, and a
21 provision stated that "Owing to the proximity of neighboring wells, the
22 applicant is reminded of his responsibility toward same and advised that
23 he may be required to regulate his withdrawal and pumping rate if existing
24 rights are injuriously affected."

25 V

Although a test well for observation of water levels in the aquifer(s)

27 FINAL FINDINGS OF FACT,
CONCLUSIONS OF LAW AND ORDER

1 would be the most desirable means to monitor the effect of Hinrichs'
2 wells, the monitoring of the quantity available in the springs and
3 creek would also be an indicator.¹ The Department estimates that the
4 cost of a test well, at \$150,000, is not justified under the
5 circumstances. We agree. However, the cost of an observation well is
6 substantially less and is justified.

7 VI

8 Cow Creek is located approximately two and one-half miles east of
9 Hinrichs' property and at a 400 foot lower elevation. The Department
10 opines that there is an impermeable stratum lying about 130 feet below
11 Cow Creek and that below this barrier is a finite amount of water avail-
12 able for appropriation. The water above the barrier supplies the
13 existing users, including appellant.² The permit provision requiring
14 casing depth from land surface of at least 500 feet minimum is
15 predicated upon reaching the barrier at such depth and is intended to
16 prevent direct withdrawal of water from the upper aquifers by Hinrichs. The
17 effect of many such deep wells beneath the barrier may, at some unknown
18 future time, affect the upper aquifers and surface waters through
19

20 1. The Department, with its superior knowledge of measurement
21 and recording of surface and spring waters, can advise appellant as
22 to the proper methods to be used to inventory water flow.

23 2. Most of the wells near both Hinrichs and Coon draw water at a
24 200 foot depth below land surface. These wells, and perennial springs,
25 are recharged by precipitation which averages about twenty-two inches
26 annually. Because of the relatively impervious nature of the soil,
27 recharge to the upper aquifers comes mainly from streams. Where stream
levels are higher than the local ground water table, recharge to
the aquifers is greater. Cow Creek appears to be at a lower elevation
than most of the wells. The springs to the Creek appear to be fed by
the ground water in the upper aquifers.

1 dewatering of the lower aquifer and resulting increase in vertical
2 percolation. Although the Department has no confirming data of the
3 underlying strata, it would be able to gather such after the drilling and
4 geophysical logging of Hinrichs' first two wells.

5 VII

6 Hinrichs intends the development of the wells to be a staged
7 process beginning in 1978 and continuing through 1983. Prior to 1980,
8 there is only enough electrical power to pump 4000 GPM of water. After
9 1980 further power will be available.

10 VIII

11 It would be prudent to limit the withdrawal of water from wells
12 placed in operation until the effects, if any, are assessed. If the
Department's theories do not "hold water", as even the experts may err,
14 the resulting impairment to existing rights could be minimized.

15 IX

16 The Department's failure to respond by letter to the particulars
17 of a letter from appellant dated January 18, 1977, while not the best
18 public relations for an agency, is not cause to invalidate the decision.
19 The concerns of the letter were made known to the Department and were
20 considered by it.

21 X

22 Appellant's contention that the subject water rights are being
23 used for speculative purpose was not established by the testimony.
24 Although Hinrichs listed the property with a realtor, such a listing
25 was intended to facilitate a property trade. In any event, such listing
has expired and Hinrichs' stated intention is to farm the land.

27 FINAL FINDINGS OF FACT,
CONCLUSIONS OF LAW AND ORDER

XI

Any Conclusion of Law which should be deemed a Finding of Fact is hereby adopted as such.

From these Findings the Board makes these

CONCLUSIONS OF LAW

I

The Board has jurisdiction over the persons and over the subject matter of this proceeding.

II

RCW 90.03.290, made applicable to public ground water by RCW 90.44.060, requires that the Department make four determinations³ prior to the issuance of a ground water permit: (1) what water, if any, is available; (2) to what beneficial uses the water is to be applied; (3) will the appropriation impair existing rights; and (4) will the appropriation detrimentally affect the public welfare. Stempel v. Department of Water Resources, 82 Wn.2d 109, 115 (1973). Appellant's contentions bring to issue only criteria 3 (impairment of its existing rights) and 4 (speculative purpose).

III

Appellant has not shown that its existing water rights would be

3. In the case of ground water withdrawals, RCW 90.44.070 adds a fifth determination which is not here at issue:

No permit shall be granted for the development or withdrawal of public ground waters beyond the capacity of the underground bed or formation . . . to yield such water within a reasonable or feasible pumping lift in the case of pumping developments

FINAL FINDINGS OF FACT,
CONCLUSIONS OF LAW AND ORDER

1 impaired by the proposed withdrawals. At most, it has shown that it
2 could possibly be affected by the withdrawals if the assumptions used by
3 the Department are shown by subsequent events to be wrong. While the
4 Department is of the opinion that existing rights will not
5 be impaired by this permit, it frankly admits that the cumulative
6 effect of other such withdrawals of water may constitute or cause
7 impairment. Furthermore, we recognize, as does the Department, that
8 prediction of such is, at best, an inexact science, and that, in this
9 case, such opinion is not based upon hard facts. Neither the origin
10 nor extent of the water beneath the surface of the ground are known.
11 It is therefore impossible to accurately predict whether and when a
12 given water appropriation will impair the prior rights of others. We
13 do know that it is in the public interest to permit the appropriation
14 of water for beneficial uses when prior rights will not be impaired.
15 We also know that it is in the public interest for the Department to
16 terminate junior water rights when a prior right is impaired and that
17 evidence of such should be gathered as new developments proceed. It
18 will be of little solace to appellant if he has to wait until there is
19 no water available in his springs before he can alert the Department
20 to the fact that nature has not followed Departmental predictions.

21 IV

22 The instant permit should therefore be further conditioned in
23 such a fashion so as to furnish means by which hard evidence may be
24 procured at an early date by the Department upon which it may base
25 regulatory action to protect prior appropriators of water from impairment.

26 FINAL FINDINGS OF FACT,
27 CONCLUSIONS OF LAW
AND ORDER

V

The Department has not developed standards of general applicability to guide it, and apprise the public, as to when and under what general circumstances it will initiate procedures calculated to regulate junior appropriators in order that senior rights will not be impaired. We recognize the difficulty of such a task, but urge the Department to undertake the development of policies, and ultimately the achievement of regulations, which, when adopted, will lend themselves to predictability and give comfort to senior appropriators where only apprehension now exists.

VI

Appellant's contention that Hinrichs' inchoate water right is for speculative purposes (with which we do not agree), even if true, would not be a basis upon which we could reverse the Department. As we have stated in a recent case:

Nor can "public interest" be interpreted to preclude the issuance of a permit where it is possible, even likely, that a permittee intends to eventually sell the land to which the water is appurtenant. Code provisions in fact facilitate such an effort by providing for the assignment of any permit to appropriate water (RCW 90.03.310). Potential abuses, particularly a wasting of water, by any permittee are addressed in the Code through requirements that actual construction work be commenced within a reasonable time (RCW 90.03.320), requirements preliminary to issuance of a Certificate of Ground Water Right (RCW 90.44.080), prohibition against any waste of public ground waters being withdrawn (RCW 90.44.110) and penalty (misdemeanor under RCW 90.44.120) for "wilful and negligent waste of ground water."⁴

4. Heer, et al. v. Department of Ecology, et al., PCHB No. 1135, (Proposed Order).

VII

Any Finding of Fact which should be deemed a Conclusion of Law is hereby adopted as such.

From these Conclusions the Pollution Control Hearings Board enters this

ORDER

Prudence requires that the permit should be amended to add the following conditions, and as so conditioned, it is affirmed:

1. Total withdrawal of water shall not exceed the following schedule:

PERIOD	MAXIMUM GPM	MAXIMUM ACRE-FEET
a. First two years	4,000	1,400
b. Second two years	4,000	1,400
c. Third two years	10,000	3,450
Total	18,000	6,250

2. Prior to the appropriation of any water under the permit, the permittee, at its expense, shall construct or otherwise make available to the Department of Ecology an observation well at such location, diameter, depth, and duration as the Department in its sole discretion shall reasonably require. Such observation well shall be monitored by the Department for the purpose of obtaining data and information which will assist it in determining if, as the result of the permittee's withdrawal of water under the permit, the prior rights of appellant and others are or may be impaired. Such data and information, from time to time, shall be made available to both appellant and the permittee. A program of monitoring shall be prepared by the Department prior to the withdrawal of any water under the permit and shall contain,

FINAL FINDINGS OF FACT,
CONCLUSIONS OF LAW AND ORDER

1 at a minimum, provisions for the measurement of the static level of
2 the observation well at such frequencies as shall coincide with the
3 staged development schedule of the well or wells to be constructed by
4 the permittee.

5 3. If it is found at any time that impairment of existing rights
6 will occur, further construction of wells shall immediately cease.

7 DATED this 1st day of August, 1977.

8 POLLUTION CONTROL HEARINGS BOARD

9 W. A. Gissberg
10 W. A. GISSBERG, Chairman

11 Chris Smith
12 CHRIS SMITH, Member

13 Dave J. Mooney
14 DAVE J. MOONEY, Member

15

16

17

18

19

20

21

22

23

24

25

26 FINAL FINDINGS OF FACT,

27 CONCLUSIONS OF LAW
AND ORDER